

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

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IN RE:

Alleged Violations of Tenn. Code Ann. § 65-4-401
et seq. and Rules of Tennessee Regulatory Authority
Consumer Services Division Chapter 1220-4-11

GutterGuard of Tennessee, Inc.

) TN REGULATORY AUTHORITY
) DOCKET ROOM

) DOCKET NO.
) 03-00082
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RESPONSE OF THE CONSUMER SERVICES DIVISION OF THE
TENNESSEE REGULATORY AUTHORITY TO THE
MOTION TO QUASH OF GUTTERGUARD OF TENNESSEE, INC.

Pursuant to Tenn. Comp. R. & Reg. 1220-1-2-.06(2), the Consumer Services Division (the "CSD") of the Tennessee Regulatory Authority (the "Authority" or "TRA") hereby responds to the *Motion to Quash* filed by GutterGuard of Tennessee, Inc. ("GutterGuard") on January 31, 2003.

Background

After receiving a number of consumer complaints alleging that GutterGuard had violated the Tennessee Do-Not-Call statutes and their concomitant regulations, on January 15, 2003, the CSD issued a *Subpoena Duces Tecum* ("Subpoena") requiring GutterGuard to provide information to assist in an investigation pursuant to Tenn. Code Ann. §§ 65-2-106 and 65-4-405(f).¹ The Data Request Notice attached to the Subpoena requested the following:

1. A copy of all telephone billing records for all phones located at GutterGuard of Tennessee, Inc. . . . including, but not limited to (615)

¹ See Tenn. Code Ann. § 65-4-401 et seq.; Tenn. Comp. R. & Regs. 1220-4-11 et seq.

242-1979 and (615) 242-9346 for the time period of April 1, 2002 through November 30, 2002.²

2. A list of all current and former employees of GutterGuard of Tennessee, Inc. and all current and former contractors and subcontractors of GutterGuard of Tennessee, Inc. who were engaged, directly or indirectly, in making telephone solicitations between April 1 and November 20, 2002. Such list shall include the first and last name, the employment dates and last known address, including the City, State and Zip Code of each employee, contractor and subcontractor.
3. A list of all current and former employees of GutterGuard of Tennessee, Inc. who were involved in decisions regarding or supervision of any and all activities of GutterGuard of Tennessee, Inc. related to telemarketing, including but not limited to appointment setting, between April 1, 2002 and December 31, 2002. Such list shall include the first and last name, the employment dates and last known address, including the City, State and Zip Code of each employee, contractor and subcontractor.

On January 31, 2003, GutterGuard responded to the Subpoena by filing: (1) GutterGuard's long distance records for a single billing cycle: from April 24 to May 24, 2002; and (2) a *Motion to Quash* the Subpoena.

The *Motion to Quash* is a two-page document that contains the following unsupported contentions: (1) Question 1 is overbroad, unduly burdensome and irrelevant, except for records of the single telephone call that is the subject of consumer complaint No. 2-00532; and (2) Questions 2 and 3 are overbroad and irrelevant.

For the reasons discussed below, the TRA should deny GutterGuard's *Motion to Quash* and compel its compliance with the CSD's subpoena.

² As will be discussed in detail later in this Response, the CSD obtained the billing records required in the question numbered 1 in the Data Request Notice attached to the Subpoena through a second Subpoena issued to GutterGuard's long distance carrier, Lightyear Communications, Inc. Having obtained the information required from another source, the CSD hereby withdraws the Subpoena with regard to the question numbered 1 in the Data Request Notice attached to the Subpoena. The CSD's withdrawal renders moot GutterGuard's motion with regard to Question 1.

The CSD Has Broad Authority to Investigate Telemarketers

“Administrative agencies wield broad power to gather information through the issuance of subpoenas.”³ Pursuant to Tenn. Code Ann. § 65-4-405(f) and Tenn. Comp. R. & Reg. 1220-4-11-.08, the CSD’s expansive authority extends to investigations of “the practices of **any** telephone solicitor conducting business in Tennessee”⁴ to determine whether violations of the provisions of the Do-Not-Call Program codified at Tenn. Code Ann. § 65-4-401 *et seq.* have occurred.⁵

In defining the perimeters of an administrative investigation, the United States Supreme Court has likened the process to an investigation conducted by a grand jury.⁶ As with a grand jury, an administrative body may “investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”⁷

Like a grand jury investigation, the proceedings presently before the panel are at a preliminary stage. The docket has just been opened, the CSD’s investigation is continuing and a show cause order has not yet been filed. The panel must consider the *Motion to Quash* in this context. Although the arguments asserted in the *Motion to Quash* raise arguments familiar in discovery-related disputes, the discovery phase of this proceeding will commence only after the show cause order is issued. Standards applicable to arguments premised upon the rules of discovery should not be applied when deliberating a motion to quash a subpoena, when the subpoena that is the subject of the motion was issued in a preliminary stage of the investigation.⁸

³ *Resolution Trust Corp. v. Thornton*, 41 F.3d 1539, 1543 (D.C. Cir. 1994).

⁴ Tenn. Comp. R. & Regs. 1220-4-11-.08 (emphasis added).

⁵ *Id.*; Tenn. Code Ann. § 65-4-405(f).

⁶ *See United States v. Morton Salt Co.*, 338 U.S. 632, 642-43, 70 S.Ct. 357, 364, 94 L.Ed. 401 (1950).

⁷ *Id.*

⁸ *See Department of Commerce and Ins. v. FirstTrust Money Services, Inc.*, 931 S.W.2d 226, 229 (Tenn. Ct. App. 1996), *Tenn. R. App. P. 11 application denied*.

The CSD's Subpoena Was Properly Issued

The Directors' role in adjudicating GutterGuard's *Motion to Quash* is "narrowly prescribed" and of a "summary nature."⁹ When an administrative subpoena is challenged, the issuing agency must show that (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to that purpose; (3) the information sought is not already within the commission's possession, and (4) the administrative steps required have been followed.¹⁰ These four (4) elements, if demonstrated by the agency, constitute "a *prima facie* case for compliance" with the Subpoena.¹¹ If these factors are shown by the CSD, the subpoena should be enforced unless GutterGuard proves the inquiry is unreasonable.¹²

Without question, the CSD's investigation is being conducted for a legitimate purpose. Between May 15, 2002 and October 29, 2002 the CSD received nine (9) complaints from Tennessee residents properly listed on the Do-Not-Call Register alleging that GutterGuard had violated Tenn. Code Ann. § 65-4-404. Since then, the CSD has received additional consumer complaints implicating GutterGuard. It is incumbent upon the CSD to investigate such complaints, particularly where, as here, there is a pattern of violations continuing even after the telemarketer has received notice of the violations.¹³ Both Tenn. Code Ann. § 65-2-106 and Tenn. Code Ann. § 65-4-405(f) specifically authorize the use of investigative subpoenas under

⁹ *National Labor Relations Bd. v. G. Rabine & Sons, Inc.*, No. 00 C 5965, 2001 WL 1772333 at * 3 (N.D. Ill. Sept. 10, 2001); *Equal Employment Opportunity Comm'n v. Bay Shipbuilding Corp.*, 668 F.2d 304, 308-09 (7th Cir. 1981).

¹⁰ *FirstTrust Money Serv., Inc.*, 931 S.W.2d at 229 (citing *Department of Revenue v. Moore*, 722 S.W.2d 367 (Tenn. 1986) (quoting *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964))).

¹¹ *Department of Revenue v. Moore*, 722 S.W.2d at 376.

¹² See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217, 66 S.Ct. 494, 510, 90 L.Ed. 614, 634 (1946).

¹³ See Tenn. Code Ann. § 65-4-405(f).

the instant circumstances.¹⁴ The CSD's purpose in conducting this investigation is clearly supported by reasonable grounds that provide a sufficient basis for an investigation.¹⁵

Turning to the second element required to establish a *prima facie* case for compliance, the information required by the Subpoena is unquestionably relevant.¹⁶ "Relevancy is determined at this stage, not by the evidentiary standard, but rather by a broader standard, requiring only a reasonable expectation that the information will shed light on" the subject of the investigation.¹⁷

Even at this preliminary stage of the proceedings, it is clear that all the information sought by the Subpoena is relevant. Question 1 seeks GutterGuard's billing records during the time period in which the CSD received the consumer complaints. As noted previously, however, because the CSD has obtained the billing records required in Question 1 of the Data Request Notice attached to the Subpoena through a second Subpoena issued to GutterGuard's long distance carrier, Lightyear Communications, Inc. ("Lightyear"), the CSD withdraws its demand for the information in Question 1 included in the Data Request attached to the Subpoena. The CSD's withdrawal of its demand for the information in Question 1 included in the Data Request attached to the Subpoena renders moot the *Motion to Quash* as it relates to Question 1.

Questions 2 and 3 seek information identifying individuals who conducted telephone solicitations or participated in decision making or supervision related thereto during the time period in which the CSD received complaints against GutterGuard. This information is relevant because it will aid in the investigation of whether GutterGuard's telemarketing complies with

¹⁴ Tenn. Code Ann. § 65-4-405(f).

¹⁵ See *Moore*, 722 S.W.2d at 376 (citing *United States v. Bisceglia*, 420 U.S. 141, 151, 95 S.Ct. 915, 921, 43 L.Ed.2d 88 (1975) (Blackmun, J., concurring)).

¹⁶ See *Moore*, 722 S.W.2d at 376.

¹⁷ *Id.*

Tenn. Comp. R. & Reg. 1220-4-11-.02 and whether GutterGuard “has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations” which would be in violation of Tenn. Comp R. & Reg. 1220-4-11.¹⁸ Without this information, the TRA cannot determine whether GutterGuard violated provisions of the Do-Not-Call statutes and regulations other than Tenn. Code Ann. § 65-4-404 or can claim a valid defense to any such violations. Clearly, the personnel contact information sought in the CSD’s Subpoena satisfies the generous standard for relevance, a reasonable expectation that the information will shed light the subject of this investigation.

Further, “a subpoena is proper even when it is designed to produce material concerning a defense that may never arise; the focus is on relevancy to the investigation, not relevancy to the issues at the hearing.”¹⁹ Here, the Subpoena requires information that is directly related to the regulatory defense stated in Tenn. Comp. R. & Reg. 1220-4-11-.07(4), whether GutterGuard has established and implemented with due care reasonable practices and procedures to effectively prevent telephone solicitations that violate the Do-Not-Call statutes and regulations.

The third element requires only that the agency demonstrate a need for information not otherwise available.²⁰ Unlike the information requested in Question 1 which has been obtained from another source, the personnel information requested in Questions 2 and 3 is in the custody of GutterGuard, the entity responsible for hiring personnel to conduct and direct its telemarketing activities. Such information is not otherwise available to the CSD and is clearly essential to the investigation.

The last element of the *prima facie* case requires that the applicable statutory

¹⁸ Tenn. Comp R. & Reg. 1220-4-11-.07(4).

¹⁹ *National Labor Relations Bd. v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1008 (9th Cir. 1996).

²⁰ See *Moore*, 722 S.W.2d at 376.

requirements have been followed and that no administrative irregularity exists in issuing the Subpoena.²¹ Tenn. Code Ann. § 65-4-405(f) clearly authorizes the issuance of investigative demands and subpoenas in the course of investigating alleged violations of the Do-Not-Call statutes and regulations. Further, the CSD, acting on behalf of the TRA, is entitled to investigate “the practices of any telephone solicitor conducting business in Tennessee.”²² It is undisputed that GutterGuard is a telephone solicitor conducting business in Tennessee; thus, the information required by the Subpoena is clearly within the ambit of the CSD’s investigative authority.

GutterGuard’s Unsupported Motion to Quash Fails to Satisfy its Burden of Proof

Upon the CSD establishing the *prima facie* elements justifying the Subpoena, the burden shifts to GutterGuard to establish that the Subpoena is unreasonable.²³ “The burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . and where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met.”²⁴

GutterGuard argues that Questions 2 and 3 are overbroad and irrelevant. As noted previously, Questions 2 and 3 require GutterGuard to provide the names of and contact information for individuals, contractors or subcontractors, working on behalf of GutterGuard between April 1 and November 20, 2002, who were (1) engaged, directly or indirectly, in making telephone solicitations or (2) involved in decisions regarding or supervision of any and all activities related to telemarketing.

²¹ See *id.*

²² Tenn. Comp. R. & Regs. 1220-4-11-.08

²³ See *Federal Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979); *Federal Trade Comm’n v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) *implicitly overruled on other grounds*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03, 102 S.Ct. 2099, 2104-05, 72 L.Ed.2d 492 (1982).

²⁴ See *Federal Trade Comm’n v. Rockefeller*, 591 F.2d at 190.

An administrative subpoena is overbroad only if it constitutes a “fishing expedition.”²⁵ GutterGuard has provided no evidence or explanation in support of its contention that the Questions are overbroad. Thus, on its face, this argument must fail for lack of proof.

Furthermore, the CSD has clearly demonstrated that the vital, personnel contact information required in Questions 2 and 3 relates directly to the reasonableness of GutterGuard’s practices and procedures, a defense available under Tenn. Comp. R. & Reg. 1220-4-11-.07(4), and whether GutterGuard’s telemarketing complies with Tenn. Comp. R. & Reg. 1220-4-11-.02. It cannot seriously be argued that Questions relating directly to a telephone solicitor’s compliance with the Do-Not-Call statutes and the TRA Rules on Telephone Solicitations constitute a fishing expedition.

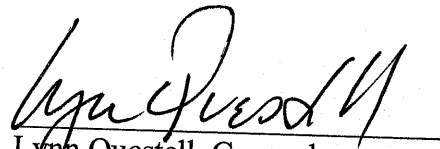
GutterGuard’s challenge to the relevance of Questions 2 and 3 is based on the legally unsupported statement that Tenn. Code Ann. § 65-4-401 *et seq.* does not impose individual liability on telephone solicitors. Notwithstanding the broad language of Tenn. Code Ann. § 65-4-404 prohibiting **any** person or entity from “knowingly mak[ing] or caus[ing] to be made” telephone solicitations in violation thereof, the CSD does not seek to impose individual liability on GutterGuard’s employees, contractors and subcontractors. As stated previously, the personnel contact information is relevant to the CSD’s investigation of whether GutterGuard’s telemarketing complies with Tenn. Comp. R. & Reg. 1220-4-11-.02 and whether GutterGuard has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the Do-Not-Call statutes and regulations.

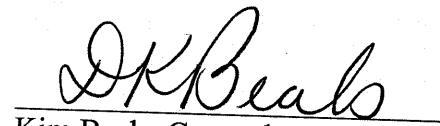
²⁵ *Federal Deposit Ins. Corp. v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997).

Conclusion

Based on the foregoing, the Authority should deny the *Motion to Quash* filed by GutterGuard with regard to Questions 2 and 3 in the Subpoena. The Authority should further find that the *Motion to Quash* is moot with regard Question 1 in the Subpoena, due to the CSD's withdrawal of its demand for the information contained in Question 1.

Respectfully submitted,


Lynn Questell, Counsel
BPR No. 020358

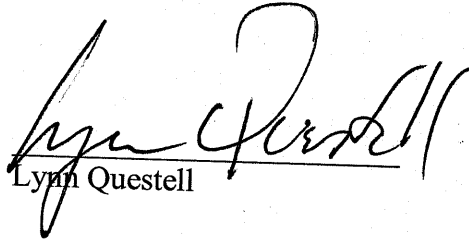

Kim Beals, Counsel
BPR No. 020426

Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Response of the Consumer Services Division of the Tennessee Regulatory Authority to the Motion to Quash of GutterGuard of Tennessee, Inc.* on the following person(s) by hand delivery or by depositing a copy of the same in the United States Mail, postage prepaid, addressed to them at the address(es) shown below, this 25th day of February, 2003:

Michael D. Fitzgerald
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
SunTrust Center, Suite 800
424 Church St.
Nashville, Tennessee 37219


Lynn Questell